# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 19-CD-502

### UNION'S POST-HEARING BRIEF

Terry C. Jensen Daniel Hutzenbiler ROBBLEE BRENNAN & DETWILER, P.L.L.P. 2101 Fourth Avenue, Suite 200 Seattle, Washington 98121 (206) 467-6700

Attorneys for Union

# TABLE OF CONTENTS

STAT	EMENT	OF THE CASE	1		
ARGU	MENT		2		
A.	Certif	ication and collective bargaining agreements	4		
	1.	The IAM's contract clearly and unequivocally covers the work at issue.	4		
	2.	The ILWU's contract does not cover the work at issue because the facility where the work is being performed is not a new facility, but is simply a relocation of operations previously performed at facilities, making it specifically exempted from coverage of the ILWU contract.	4		
	3.	Even if the PCLCD covers the work at issue, the Board should not give the agreement controlling weight.	8		
В.	Efficiency and economy of operations				
C.	Relative skills and safety				
D.	Company and area practice				
E.	Acquiescence				
F.	Job loss				
G.	Arbitr	rator's Award	15		
н.	Frictio	on .	15		
I.	Emplo	oyer's assignment and preference	15		
	1.	Relying solely on preference is inappropriate in this case because: 1) Other factors weigh in favor of IAM; 2) Violates Past Practice; 3) Preference is not based on anything; 4) Debatable whether it really is SSA's preference.	15		
		a. The weight of the other relevant factors weighs in favor of the IAM.	16		

	b. SSA provided no justification for the work assignment other than PMA's contract with the ILWU.				
	c.	SSA's assignment to the ILWU is contrary to its own past practice.	18		
	d.	SSA's assignment is suspect because it was made under pressure and without justification.	18		
CONCLU	USION		21		

#### STATEMENT OF THE CASE

This case involves yet another attempt by the International Longshore and Warehouse Union ("ILWU") to poach work belonging to another union. *See, e.g.,* International Longshore and Warehouse Union, Local 10, 352 NLRB 162 (2008); International Longshoremen's Association, Local 1291, 307 NLRB 1394 (1992); Local 1332, International Longshoremen's Association, 264 NLRB 319 (1982); International Longshoremen's and Warehousemen's Union, Local No. 50, 223 NLRB 1034 (1976); Warehousemen's Union Local 6, 144 NLRB 1489 (1963). Specifically, this case involves a jurisdictional dispute between the International Association of Machinists, District Lodge 160 ("IAM") and the ILWU over the maintenance and repair ("M&R") of certain equipment owned and/or leased by SSA Marine, Inc. ("SSA" or "the Employer") at Terminal 91 on the Seattle waterfront.

Since the 1940s, SSA has had collective bargaining agreements with the IAM that have covered all M&R work owned and leased by SSA in the Puget Sound area. Jt. Ex. 3, ¶ 9. Since at least 2002, the agreement between SSA and IAM has explicitly stated that "IAM represented employees will maintain and repair all equipment owned or leased by SSAT in the Puget Sound area." Jt. Ex. 5 at p. 2.

The Pacific Maritime Association ("PMA") is a multi-employer association that bargains on behalf of companies working at the various ports on the West Coast. Jt. Ex. 3, ¶ 8. SSA is a member of PMA. *Id.* In 2008, the ILWU entered into a contract with the PMA known as the Puget Sound Longshore Contract Document ("PCLCD"). Jt. Ex. 3, ¶ 11. A July 1, 2008 Letter of Understanding ("LOU") between the ILWU and the PMA provides that M&R work at "new" terminals will be assigned to ILWU. Jt. Ex. 10.

Certain facilities are exempted from the operation of this provision. The LOU provides that an employer may "vacate a 'red-circled' facility and then relocate its operations to another facility within the same port (other than newly constructed terminals subject to ILWU jurisdiction under Section 1.731) and retain its incumbent non-ILWU mechanic workforce, provided the relocation maintains a continuity of operations, personnel, and equipment." Jt. Ex. 10.

The Port of Seattle recently completed construction of a new building at Terminal 91. TR 42. Prior to that, Terminal 91 had otherwise operated as a port for other ships. After construction of that building, SSA moved work that it had been performing at Terminals 30 and 66 in Seattle to Terminal 91. TR 85. Terminal 30 is a "red-circled" facility. Jt. Ex. 10. In April 2009, SSA assigned M&R work at Terminal 91 to the ILWU. Jt. Ex. 3, ¶ 14. This dispute ensued.

#### **ARGUMENT**

This is a jurisdictional dispute between the IAM and the ILWU over the M&R work performed at Terminal 91 in Seattle by SSA. Each of the labor organizations claims the work in question. Jt. Ex. 2,  $\P$ 2. Each of the labor organizations has a collective bargaining agreement with SSA, and each claims that their agreement covers the disputed work. *Id.*,  $\P$ ¶ 3-4. The IAM has threatened to take job action, up to and including picketing, should the disputed work be assigned to the ILWU. *Id.*,  $\P$  5. There is no binding, tri-partite method of adjusting this dispute. *Id.*,  $\P$  6.

Under the Board's traditional analysis for resolving jurisdictional disputes, the work at issue should be awarded to members of the IAM. In deciding a jurisdictional

Sometimes witnesses at the hearing used "Pier" and "Terminal" interchangeably. However, the two actually refer to somewhat different entities, as a Terminal can house more than one Pier. For example, Terminal 91 actually houses both Piers 90 and 91.

dispute, the Board considers all relevant factors, and "its determination in a jurisdictional dispute would be an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case." <u>IUOE, Local 150</u>, 348 NLRB 672, 674 (2006). Five basic factors that the Board considers are: (1) certification and collective bargaining agreements, (2) efficiency and economy of operations, (3) relative skills and safety, (4) area and industry practice, and (5) employer's practice and preference. <u>Jones Construction</u>, 135 NLRB 1402 (1962). Other factors that the Board has considered include acquiescence, job loss, awards of arbitrators and friction.

The IAM's collective bargaining agreement with SSA plainly and explicitly covers all M&R work performed in the Puget Sound area, as the IAM's chas hirsotically have, while the ILWU's contract with the PMA does not. Even if it can be concluded that the ILWU's contract covers the specific work at issue, the Employer provided no evidence to support its decision to award the work to the ILWU, other than the contract itself.

IAM mechanics are more experienced and more qualified to perform the M&R work. And, the use of the ILWU is contrary to SSA's practice of more than forty years. Because the only basis for the Employer's purported preference of the ILWU is the contract signed by PMA with the ILWU, that preference alone is insufficient to weigh in favor of awarding the work to the ILWU. Therefore, considering that the other factors weigh in favor of the IAM, the Board should award the work to the IAM.

### A. Certification and collective bargaining agreements

1. The IAM's contract clearly and unequivocally covers the work at issue.

The IAM's contract, without question, covers the work at issue in this case. The work at issue is the maintenance and repair work being performed at Terminal 91 in Seattle on equipment owned or leased by SSA. The agreement between SSA and IAM explicitly states that "IAM represented employees will maintain and repair all equipment owned or leased by SSAT in the Puget Sound area." Jt. Ex. 5 at p. 2. Without a doubt, that language covers the work in dispute. At the suggestion of SSA, that section was strengthened during negotiations in 2002 "so we didn't have any more jurisdictional issues with the ILWU in the future." TR 396.

2. The ILWU's contract does not cover the work at issue because the facility where the work is being performed is not a new facility, but is simply a relocation of operations previously performed at facilities, making it specifically exempted from coverage of the ILWU contract.

The work performed at Terminal 91 is specifically exempted from the ILWU's contract. Where one of the unions engaged in a jurisdictional dispute does not have a contract with the employer covering the work in dispute, this factor obviously favors the union that does have such a contract. *See, e.g.,* Theatrical Protective Union, Local One, 255 NLRB 955, 957 (1981).

The PCLCD provides that the ILWU will have jurisdiction over "the maintenance and repair work on all new marine terminal facilities that commence operations of July 1, 2008." Jt. Ex. 9 § 1.731. However, M&R work that is merely relocated from a terminal or pier within the same Port is specifically exempted. Thus,

ILWU jurisdiction of maintenance and repair work shall not apply at those specific marine terminals that are listed as being "red-circled" in the July 1, 2008 Letter of Understanding on this subject. Red-circled facilities, as they are modified/upgraded (e.g., introduction of new technologies), or expanded, while maintaining the fundamental identity of the pre-existing facility, shall not result in the displacement of the recognized workforce and shall not be disturbed, unless as determined by the terminal owner or tenant.

Jt. Ex. 9 § 1.81. The Letter of Understanding ("LOU") referenced in the PCLCD further provides that

[t]he Parties agree that a terminal operator that is the owner or lessee of a "red-circled" facility and that has a direct collective bargaining relationship with another union as of July 1, 2008, may vacate a "red circled" facility and then relocate its operations to another facility within the same port (other than newly constructed terminals subject to ILWU jurisdiction under Section 1.731) and retain its incumbent non-ILWU mechanic workforce, provided the relocation maintains a continuity of operations, personnel, and equipment.

Jt. Ex. 10 (LOU). Terminals 30 and 66 are listed as "red circled" facilities. *Id.* Thus, under the ILWU's contract and the LOU, the relocation of operations from one of those facilities explicitly exempts the M&R work being performed at the relocated terminal from the jurisdiction of the ILWU.

That is precisely the situation at hand. The operation at Terminal 91 is not new. Rather, Terminal 91 houses the relocated cruise ship operation that previously was housed at Terminals 30.<sup>2</sup> Accordingly, the M&R work performed at Terminal 91 is explicitly exempted from the ILWU's jurisdiction. The ILWU's contract does not even cover the work in question.

The only reason given to consider Terminal 91 a new operation is because it houses a new building and new gangways. TR 179, 220. However, gangways are operated by the Port of Seattle, not by SSA, and are thus irrelevant. TR 279.

The M&R work on cruise ship-related equipment at Terminal 66 continues to be done by the machinists rather than by the ILWU.

Furthermore, simply because a single new building is built upon an already existing structure does not thereafter make all operations on that structure "new."

In fact, the evidence at hearing showed plainly that the operation now at Terminal 91 was simply a relocation of the operation that had been in place at Terminal 30. The predominant operation at Terminal 91 will be the operation of cruise ships. There have been cruise ships at Terminal 30 for at least ten years. TR 225. Thus, the operation of a cruise ship facility is nothing new to the Port of Seattle.

More specifically, SSA's Senior Vice President, Edward DeNike, testified without contradiction that Terminal 91 is a relocation of the operation that had been in place at Terminal 30, explaining that "[w]e moved the business from Terminal 30 to Pier 91 so that a container terminal could be built at 30." TR 85 (emphasis added). Thus, the Employer's own witness testified that SSA simply relocated its business from Terminal 30 – a red-circled (and therefore exempt) facility— to Terminal 91.3

DeNike later reiterated that the operations formerly performed at Terminal 30 are the same as those now being performed at Terminal 91. "Pier 30 isn't as nice looking, if you were a passenger coming off of a ship, as 91 is today *but functionally they're about the same*." TR 111 (emphasis added). Thus, the Employer's own witness twice testified without contradiction that SSA simply relocated operations from Terminal 30 to Terminal 91.<sup>4</sup>

It is worth noting that Terminal 91 is approximately the same size as any passenger cruise facilities that previously existed in Seattle. TR 42.

Apparently, the ILWU and the Employer are arguing that Terminal 91 is a "new" operation because SSA did not move *all* of its operations from Terminal 30 to Terminal 91. That is absurd. Simply because SSA moved some of its operations, rather than all of them, does not mean that those specific operations were not relocated.

Further, the mechanic work previously being performed at Terminal 30 is indisputably the same as the work now being done at Terminal 91. At the hearing, DeNike testified, again without contradiction, as follows:

HEARING OFFICER DUNN: Okay. So, was the work being performed at Pier 91 as of April 24<sup>th</sup> the same work that had been done at Pier 30.

THE WITNESS: Yes.

TR 75. Thus, not only is the operation the same at Terminal 91 as it had been at Terminal 30, but the actual work being performed at each location is the same.

Additionally, almost all of the equipment at Terminal 91 was transferred from Terminal 30, including forklifts, electrical pallet jacks, and trucks. TR 110. In fact, out of all the equipment now located at Terminal 91, there are only five pieces of equipment – cranes – that did not come from Terminal 30. TR 110. All of that equipment came from Terminals 30 and 66, where members of the IAM had worked on that equipment. TR 331-32. The IAM previously worked on all of that equipment. *Id.*<sup>5</sup> Also, some of the ships currently docking at Terminal 91 were most recently docked at Terminal 30 and 66. TR 72.

Moreover, the IAM has previously performed mechanics' work at Terminal 91. SSA had operations at Terminal 91 approximately 15-20 years ago. TR 52. It employed IAM mechanics there at that time. TR 52-53, 280. The work involved the loading and unloading of frozen cargo, fish, and automobiles, as well as fruit. TR 52, 79.

Moreover, any ambiguity as to the meaning of "new" versus old facilities should be construed against ILWU. ILWU negotiated a contract with PMA, of which SSA is a member, assigning maintenance and repair work to the ILWU at "all new marine facilities that commence operations after July 1, 2008." Jt. Ex. 9, § 1.731. They could have brought in to testify the people that negotiated the contract to specifically define what "new" meant, but did not.

Additionally, cruise ships have previously been worked on at Pier 90 (TR 247), which is part of the same physical structure as Terminal 91. TR 115.

The Port of Seattle, the owner of Terminal 91, considers it to be a relocation of the operation that was formerly at Terminal 30. It released an environmental impact statement about the Terminal 91 project entitled "Terminal 30 Container Reactivation and Cruise Terminal Relocation." Jt. Ex. 19 (emphasis added). Within that document, the Port explains that "[t]he Port of Seattle is proposing to reactivate existing pier and upland area at Terminal 30 as a container cargo facility and to relocate the Terminal 30 passenger cruise ship operations...." Id. at 1. See also Jt. Ex. 26 (Terminal 91 operation "was relocated from its former temporary home at Terminal 30...").

Thus, the ILWU's contract does not even cover the disputed work, and this factor favors the IAM. Any argument to the contrary is a quizzical one, especially in the light of the indisputable, pre-existing language in the IAM contract <u>plainly</u> keeping that work with the IAM employees.

# 3. Even if the PCLCD covers the work at issue, the Board should not give the agreement controlling weight.

Even if the Board concludes that the ILWU's contract covers the disputed work, the factor is not controlling in this case because the SSA's employees were covered by the IAM contract at the time the PCLCD was entered into. "The Board will refuse to give controlling weight to a collective-bargaining agreement executed at a time when employees covered by an existing contract are performing the work in dispute under the terms and conditions set forth in the existing contract." <u>IUOE, Local 150</u>, 348 NLRB 672, 675 (2006), *citing* State Lathing Co., 153 NLRB 1189, 1194 (1965).

The IAM indisputably had a contract in existence at the time that the ILWU signed their contract covering "new" facilities. Accordingly, even if the Board finds that the ILWU's contract somehow covers the disputed work, it should not be given controlling weight.

Moreover, the reality is that the Employer had already contracted away the disputed work to the IAM, long before the agreement between PMA and ILWU was reached. Thus, SSA could not agree to give the M&R work to the ILWU, as such work was not available to contract away; thus, any agreement by SSA to contract M&R work to the ILWU was illusory, and unenforceable.<sup>6</sup>

### B. Efficiency and economy of operations

As described more fully below, (see discussion Section I, infra), the Employer relied upon the contract signed between the PMA and ILWU as its sole basis for assigning the work to the ILWU and "preferring" that the ILWU perform the work. TR 62. SSA had no operational basis for assigning the work to the ILWU. Therefore, there is no evidence from the Employer that it is more efficient or economical to use ILWU "mechanics" than those from the IAM.

The only evidence relating to the economy or efficiency of the ILWU was presented by the ILWU itself. PMA's representative, called by the ILWU, testified generally that it was beneficial to an employer to have ILWU mechanics because "if there's a mechanic that can do the operation, and if there's a need for additional long shore workers, the mechanic can step in and do that work. So it just gives the employer

This would be akin to Party A agreeing to sell its house to Party B, then subsequently attempting to reach an agreement with Party C to sell that house. For Party C, there is simply nothing to buy, as what Party C thought it was buying was simply not available.

group a larger pool of labor to draw from." TR 167. Also, PMA believes that it saves money because of an issue related to the ILWU's contract, Pay Guarantee. TR 190.

However, there is no evidence that any of this is true in any fashion for SSA, the relevant employer. Nor, as discussed, is there any evidence that it played any role whatsoever in SSA's work assignment. Moreover, given that SSA has seen fit to give the disputed work to the IAM for over forty years, and itself provided no evidence that the ILWU was more efficient than the IAM, it is reasonable to conclude that the Employer itself believes it more efficient to assign the work to the IAM.

Moreover, the IAM has long provided SSA with a full-time, skilled workforce. The ILWU, on the other hand, provides employees through its hiring hall, or requires an employer to find mechanics on its own. TR 241-42. Those employees may or may not be qualified. TR 216. In no way can that be described as more efficient. In fact, the Board has previously recognized, *in a nearly identical situation*, that having a full-time workforce is more efficient for an employer than having to call for employees from the ILWU's hiring hall. <u>International Longshoremen's Association</u>, 307 NLRB 1394, 1397 (1992). Therefore, this factor favors the IAM.

### C. Relative skills and safety

As described more fully below, (see discussion Section I, infra), the Employer relied upon the contract signed between the PMA and ILWU as its sole basis for assigning the work to the ILWU and "preferring" that the ILWU perform the work. TR 62. SSA had no operational basis for assigning the work to the ILWU. Therefore, there is no evidence from the Employer that ILWU "mechanics" have more skills or work more safely than those from the IAM.

In fact, Darrell Stephens, SSA's maintenance manager (TR 309), has previously testified before the Board that IAM mechanics are "the *most qualified mechanics* that we can possibly assemble." Jt. Ex. 15 at 151 (emphasis added). At the instant hearing, Stephens reiterated that he maintains that opinion to this day. TR 319. Similarly, DeNike testified that he had reviewed Stephens' testimony, and that he agrees with everything Stevens said about quality, training, and skills of IAM mechanics. TR 84. More specifically, DeNike testified that there is nothing different today about the IAM Mechanics' skills, abilities, or experience, which had previously led to them being described as the "most qualified mechanics" available. TR 84. Thus, the only evidence from the Employer is that IAM mechanics are the "most qualified mechanics" available.

This fact is reinforced by further testimony. There are significantly different skills required for each set of mechanics. TR 58. Power mechanics repair power equipment and diesel equipment – things that have an engine. TR 57. Other mechanics repair containers and chassis and work on reefer containers. TR 57. Crane mechanics do more electrical work. TR 57. Thus, the skills of a journeyman power mechanic and other journeyman mechanics are not interchangeable per se. TR 277.

It is undisputed that IAM mechanics are fully qualified to perform these operations. Since at least 1999-2000, SSA mechanics represented by IAM have been working on equipment related to cruise ships in Seattle. TR 278. They have worked on them in Terminals 30 and 66. TR 278. On the other hand, there is no evidence that ILWU mechanics are capable of performing these operations, in particular the work required of a power mechanic.

Kelvin Lageson, an IAM power mechanic, has worked at SSA's Marine Power Shop on Terminal 18 since August 1996. TR 269-70. Before that he worked for 25 years in the automotive industry as a mechanic. TR 270.

Lageson testified that his duties as a journeyman mechanic for SSA include: working on cranes, reach stackers, yard tractors, picks, forklifts, dock trucks, dock vehicles, electric forklifts, electric pallet jacks, regular pallet jacks, manual pallet jacks, golf carts, and rubber-tired Gantry cranes for a cruise ship. TR 271. While with SSA he has rebuilt engines, serviced them, changed oil, dressed valves, serviced transmissions, swapped motors out, swapped transmissions out, and worked on hydraulic systems. TR 273. The work is complex, and requires a significant amount of knowledge. TR 275. There is no evidence, from either the ILWU or the Employer, that ILWU mechanics have done, or are capable of doing, any of these tasks.

Furthermore, IAM mechanics are required to possess significantly more tools. ILWU mechanics are only required to have around \$100-\$300 worth of basic tools. TR 369. Lageson has \$15,000-\$20,000 worth of tools, which is true of each of the IAM mechanics. TR 274. Also, IAM mechanics have a reference library on site, as well as two large reference manuals, to assist in the M&R work. TR 274. Again, there is no evidence that the ILWU has any of this.

The ILWU may argue that there have been no complaints as of yet about the work done by the ILWU "mechanics" for SSA. TR 188. However, that is undercut by the fact that there has not been *any* major M&R work at Terminal 91 since the cruise ships returned to that area. TR 350. Thus, the ILWU mechanics have not had to show that they are capable of performing any mechanical work of substance. Other than Terminal

91, ILWU "mechanics" have worked on power equipment at Terminal 86. TR 265. At Terminal 86, they have worked on a couple of forklifts. *Id.* However, the ILWU's own witness had no idea what work the "mechanics" have done on the very limited equipment he "believed" his members had worked on..

The ILWU may also argue that ILWU gearmen are capable of performing the disputed work. However, ILWU gearmen in Seattle do not traditionally repair power equipment or engines of any kind. TR 189.

DeNike did testify that, based on his experience, ILWU mechanics are competent and skilled to perform "this work." TR 47. However, there is a significant difference between being merely competent and being the most skilled and qualified. As described above, the evidence shows without contradiction that the IAM mechanics are highly skilled and capable of performing complex maintenance and repair work; there is simply no evidence that ILWU "mechanics" are in any way capable of performing such work at the same level. Moreover, there is no discussion as to what work is specifically being discussed by Mr. DeNike.

Thus, the evidence shows that the IAM mechanics are indisputably the "most qualified mechanics" that SSA can possibly assemble. For that reason, this factor favors the IAM.

# D. Company and area practice

The Employer's past practice is for members of the IAM to perform its M&R work. That has been the practice for over forty years. Similarly, the area practice is for members of the IAM to do the work. DeNike testified that he does not know of any

employers in Seattle who use ILWU power mechanics, except for SSA since April. TR 63. Thus, these factors both favor the IAM.

### E. Acquiescence

The Board also may consider a union's long acquiescence in a work assignment. ILWU, Local No. 50, 223 NLRB 1034, 1037 (1976). Before the contract negotiations with PMA in 2008, the ILWU had long acquiesced in M&R work being performed by SSA belonging to the IAM. In fact, their attorney previously conceded as much, stating in a previous hearing on this subject that the line of demarcation between IAM mechanic work and the ILWU mechanic work "has always been whether or not the equipment is based in Everett...[i]f the equipment is not based in Everett, then that is work that the IAM was to repair." Jt. Ex. 15 at 22-23. This factor therefore favors the IAM.

#### F. Job loss

There were no jobs lost with the reassignment of the disputed work, according to the Employer. *See, e.g.,* In re General Teamsters Local No. 174, 340 NLRB 137, 141 (2003). On the other hand, it defies all logic that there was not some loss in hours of work (ie, income) for IAM-represented employees when some of their historical work was reassigned in April, 2009, to ILWU-represented employees. This work ALL used to be done by IAM-represented employees; the ILWU has now been given some of this work in response to its strong-arm tactics. There would be NO job loss for ILWU members if the work were properly assigned, as they have indisputably never previously had this work either in Seattle nor anywhere else in Puget Sound. What has happened, de facto, is that the ILWU's voracious appetite for obtaining new work has been assuaged by the PMA by essentially creating inefficient, new jobs that never existed for the ILWU

in the past. This is not consistent with the need to respect true efficiency of operations in the new, global economy.

#### G. Arbitrator's Award

It is undisputed that SSA and IAM engaged in an arbitration over SSA's change in work assignment, and that the arbitrator found that SSA's change was a violation of the parties' collective bargaining agreement.

#### H. Friction

The Board has considered the possibility of friction between groups of employees as a result of work assignments. The specific work in question (M/R work on power equipment related to cruise ships) has existed in Seattle and Puget Sound for about 10 years, and is growing rapidly. (M/R work on power equipment of all sorts has existed in Seattle and Puget Sound for decades (TR 167-68) and has virtually always been done by IAM-represented employees) The friction between the two labor organizations involved is well-documented in NLRB cases where the ILWU has attempted aggrandizement of IAM work. Jt. Ex. 31. Should the ILWU's raid succeed here, rewarding the ILWU efforts, the potential for labor difficulty only grows exponentially.

# I. Employer's assignment and preference

1. Relying solely on preference is inappropriate in this case because: 1) Other factors weigh in favor of IAM; 2) Violates Past Practice; 3) Preference is not based on anything; 4) Debatable whether it really is SSA's preference.

The only factor that arguably weighs in favor of the assignment of the work to the ILWU is the Employer's purported "preference." SSA Senior Vice President Edward DeNike testified that SSA's preference is for the ILWU to do the work. TR 34.

The Board has frequently assigned work based on employer preference. However, SSA's asserted preference should not be given controlling weight for several reasons: 1) all other factors weigh in favor of an assignment to the IAM; 2) the assignment and preference violates SSA's past practice; 3) SSA provided no justification for the preference except for PMA's contract with the ILWU; and 4) it is not evident that SSA truly has a preference for the ILWU given that the Employer only changed its long-standing practice after being pressured to do so.

# a. The weight of the other relevant factors weighs in favor of the IAM.

SSA's purported preference for the ILWU is not controlling because it is contrary to the other relevant factors. The Board has long held that "where, as here, an employer's assignment is contrary to the weight of other relevant factors considered in light of the circumstances of the case, the Board does not give controlling weight to [employer preference]." ILWU, Local No. 50, 223 NLRB 1034, 1036 (1976). As the Board explained,

in many cases the Board's approach has led to determinations of jurisdictional disputes in favor of the employees to whom the employer has assigned the work. But such awards are in large measure due to the fact that the employer, in making the assignment, has taken into account the very factors normally weighed by the Board and the Board, in independently evaluating the merits supporting the competing claim, has found itself constrained to determine the award of the disputed work so as to coincide with the employer's assignment. But that is not the same as saying that the Board has accorded employer preference preeminence in its determination of work disputes. Indeed, the Board has consistently held that 'an employer's assignment of disputed work cannot be made the touchstone in deciding a jurisdictional dispute.'

*Id.* In this case, there is no evidence that SSA took into account *any* of the factors that the Board normally considers in making a decision. Therefore, given that the weight of

the other relevant factors weighs in favor of an award of the disputed work to the IAM, SSA's preference is not controlling. Moreover, Employer witness DeNike was completely unable to articulate why he would assign the ILWU per their contract, and <u>not</u> assign the work to IAM members per their contract!

# b. SSA provided no justification for the work assignment other than PMA's contract with the ILWU.

In the same way, SSA's asserted preference for the ILWU is not controlling because it provides no justification, other than the contract between PMA and ILWU, for such a preference. Where an employer does "not support his preference with considerations of economy, efficiency, or skill," the employer's assignment and preference are not controlling. Valley Plate Glass Co., 196 NLRB 1140, 1142 (1972). That is plainly the case here. The Employer provided no evidence that its preference was based on "economy, efficiency, or skill." As SSA made clear, its preference is based solely on the language of the contract that PMA and the ILWU negotiated. TR 62; see also Jt. Ex. 29 (reason for assignment of work to ILWU "is the 2008 contract with the ILWU"). It has no operational justification for assigning the work to the ILWU. TR 62.

In fact, IAM had a long, productive, successful relationship with no complaints from SSA in maintaining all power equipment in Puget Sound for SSA. TR 62. At the time of PMA's decision to contract with the ILWU over the M&R work at "new" facilities, DeNike knew nothing about the experience, training, and qualifications of any ILWU mechanics. TR 63. He did not know how equipped or qualified ILWU workers would be. TR 71. PMA simply made a commitment in negotiations to the ILWU. Therefore, SSA's asserted preference is not controlling for this reason as well.

# c. SSA's assignment to the ILWU is contrary to its own past practice.

Furthermore, the Board will not adhere to an employer's preference when such a preference is contrary to the employer's own past practice. <u>The Zia Company</u>, 168 NLRB 494, 496 (1967); <u>State Lathing Co.</u>, 153 NLRB 1189 (1965). That is plainly the case here. As described above, there is a long-standing practice of this work being done for SSA by IAM members.

# d. SSA's assignment is suspect because it was made under pressure and without justification.

Moreover, SSA's newly-determined preference is not controlling because it was not made as a free and independent choice, but rather was arrived at because of pressure placed upon SSA. In evaluating the factor of employer preference, the Board "cannot ignore the circumstances which caused [the] change in the Employers' past assignment of the work in dispute." ILWU, Local No. 50, 223 NLRB at 1037. Thus, the Board will be skeptical where an employer's preference changes due to pressure from a third party, rather than from the employer's own free will. *Id*.

In that case, the Employers assigned to members of the Operating Engineers union the work of operating floating cranes from 1964 until 1969. In 1969, the Longshoremen engaged in a work stoppage over the assignment of that work; the Employers thereafter assigned the work to Longshore members, resulting in a jurisdictional dispute.

The Employers and Longshoremen argued at the 10(k) hearing that the Board should resolve the dispute based upon the Employers' asserted "preference" for the work to be done by the Longshoremen. The Board rejected this approach, recognizing that the

Employers' preference only arose after it had been pressured to change its preference by the Longshoremen. The Board explained that

[t]he Employers' 'preference' changed only after the Respondent's members engaged in a work stoppage which forced the Employers' reassignment of the work to longshoremen. Notwithstanding that the Employers now profess a continuing preference for the longshoremen a continuing preference for the longshoremen to do the work, in evaluating the factor of employer preference we cannot ignore the circumstances which caused this change in the Employers' past assignment of the work in dispute. Thus, as set forth above, the evidence establishes that the Employers' reassignment of the operation of the floating cranes was brought about by Respondent's work stoppage which occurred at a time when Respondent's members were not performing the work and in the face of a long history of the Employers' freely determined assignment to employees represented by the Operating Engineers. circumstances, we are constrained to treat the Employers' asserted postwork-stoppage preference for longshoremen with a good deal of skepticism because such statements of preference may not be representative of a free and unencumbered choice. We are, therefore, unable to accord as much weight to this factor in making our award of the work in dispute as we would have if the evidence had established that the preference favoring longshoremen had been freely indicated prior to the instant dispute. To the contrary, in view of the long period of employer preference favoring the operating engineers to the exclusion of longshoremen, this factor is at least equally favorable to employees represented by the Operating Engineers as to employees represented by Longshoremen, and, hence, is of no aid to us in deciding which group of employees should be awarded the work.

#### Id. at 1037 (emphasis added).

Similarly, this decision was not made in a vacuum, where SSA could rationally compare the choices before it and determine which union it preferred to have perform the work in dispute. Don Hursey testified that PMA forced DeNike to say that he did not prefer the IAM anymore. TR 393. As Hursey explained, "[DeNike] says that the PMA felt that SSA was holding up negotiations with the ILWU and he wanted them to get off their issue and get this thing concluded. So he was forced to accept the fact that he was going to say that he would not prefer...IAM." TR 398. Thus, similar to what occurred in

<u>ILWU</u>, <u>Local No. 50</u>, SSA's decision to change its work assignment on M&R work was made only after succumbing to pressure, and as such its preference is not controlling.<sup>7</sup>

The ILWU may claim, as it did at hearing, that DeNike contradicted Hursey in his testimony. That is simply not the case. DeNike never denied that he was forced – simply said that that was a bit too strong of a word. DeNike testified that he did not recall whether he had a conversation with Hursey specifically regarding Terminal 91 and his preference. TR 91-92. He also testified that he had told Hursey that, as a multi-employer bargaining unit, it was in the best interests of the industry for SSA "to go along with the commitment to the ILWU." TR 93. The closest that DeNike came to a contradiction was his testimony that the term "forced might be a little heavy." TR 93.

Testifying that the term "forced" might be excessive is completely different from directly contradicting Hursey's testimony. Moreover, as DeNike testified, he does not recall the conversation that Hursey was testifying to; thus, it is literally *impossible* for him to contradict Hursey's testimony about that conversation.

Notably, DeNike does not in any way deny the thrust of the conversation – that SSA was going to assign the disputed work to the ILWU not because of a free and rational choice it was making as an employer, but because of some kind of outside pressure being placed upon it. Even if SSA was not directly forced to make the change, it is clear from the record that there was some kind of pressure put on the Employer.

This is made particularly clear by the evidence put on at hearing; there is simply no other explanation given that SSA has no justification for the change in assignment – the Employer was very happy with the work done by IAM, and that has *never* changed.

It was also noteworthy that SSA's maintenance supervisor, Stevens, could not articulate <u>any</u> reason why SSA would prefer ILWU members.

It put on no evidence that the ILWU was more efficient, economical, or skilled than the IAM. In fact, at the time it agreed to the change, SSA had absolutely no idea what type of mechanics the ILWU would be sending it. It is also reinforced by the fact that SSA asked to be indemnified for what it knew would be a breach of its contract. TR 94. Simply put, there is no logical reason for SSA to have assigned the work to the ILWU, other than succumbing to pressure. For that reason, SSA's "preference" is not controlling.

#### CONCLUSION

For the foregoing reasons, the Board should award the disputed M&R work, performed by SSA at Terminal 91 in Seattle, to employees represented by IAM District Lodge 160, Local Lodge 289.

DATED this 24<sup>th</sup> day of July, 2009.

Daniel/Hutzenbiler

ROBBLEE BRENNAN & DETWILER, P.L.L.P.

2101 Fourth Avenue, Suite 200

Seattle, Washington 98121

(206) 467-6700

Attorneys for Union

An examination of records related to ILWU "mechanics" demonstrates that employers, like SSA, who request such "mechanics" from the ILWU hiring hall have no control over whether they receive qualified mechanics from that source. In response to a subpoena from IAM, Harbor Industrial — SSA's subcontractor that is actually performing the M&R work — provided Jt. Ex. 28. That exhibit shows each individual dispatched to Harbor to perform the disputed work since April 2009. Those records show that there have been eleven ILWU members in Seattle who have been dispatched as mechanics since Terminal 91 opened in April of this year. IAM Exs. 1(a)-(f) demonstrate the hours worked by those individuals in the preceding five years, as mechanics. A summary of those exhibits is provided below:

	2009	2008	2007	2006	2005	2004
Castronover	100s	100s	100s	100s	100s	100s
de Joney	0	0	87	114	47	0
Accettola	14	100s	100s	191	238	0
Quinlan	0	0	0	0	0	0
MacDonald	0	0	0	0	0	0
West	0	0	0	0	0	0
Baker	944	100s	100s	100s	100s	100s
Gomes	0	0	0	0	0	0
Getahun	0	0	0	0	0	0
White	0	0	0	0	0	0
Yoeman	0	0	0	0	0	0

Id. Thus, fully 7 out of 11 people dispatched by the ILWU as "mechanics" since April of this year had virtually 0 hours of experience working as "mechanics" in the last 5+ years. One of those dispatched had no hours worked as a "mechanic in 2008, and averaged only 82.67 hours per year (or basically two weeks) in the three years prior. Such evidence demonstrates that employers, such as SSA, requesting ILWU "mechanics" are very likely to be dispatched members with literally no experience whatsoever as mechanics. Furthermore, even for those that are listed as having previous mechanic experience, there is no description of what type of actual work these individuals did.

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 24<sup>th</sup> day of July, 2009, I caused the original of the foregoing UNION'S POST-HEARING BRIEF to be filed with the National Labor Relations Board via e-filing to:

Lester Helzer
Executive Secretary
National Labor Relations Board
1099 14<sup>th</sup> Street Northwest, Room 11602
Washington, D.C. 20570

Richard Ahearn, Director National Labor Relations Board Region 19 2948 Jackson Federal Building 915 Second Avenue Seattle, Washington 98174

On this same date, I caused a true and correct copy of the same to be served via e-mail to:

Robert S. Remar Leonard Carder, LLP 118 Franklin Street, Suite 201 San Francisco, California 94109-6852 E-mail: rremar@leonardcarder.com

James McMullen, Jr.
Gordon & Rees, LLP
101 West Broadway, Suite 2000
San Diego, California 92101
E-mail: jmcmullen@gordonrees.com

Terry C. Jensen Daniel Hutzenbiler

ROBBLEÉ BRENNAN & DETWILER, P.L.L.P.

2101 Fourth Avenue, Suite 200 Seattle, Washington 98121

(206) 467-6700

Attorneys for Union